625 South State Street
Ann Arbor, MI 48109

November 4, 2009

Dear Members of the Michigan House Committee on Senior Health, Security and Retirement:

Thank you forgiving me an opportunity to comment on HB 4621. I am sorry I cannot do so in person, and that because of the press of time these comments will have to be brief.

I am the Ralph W. Aigler Professor of Law at the University of Michigan Law School. I have written extensively on the Confrontation Clause and maintain the Confrontation Blog, www.confrontationright.blogspot.com, to comment on developments related to it. I argued *Hammon v. Indiana* (a companion to *Davis v. Washington*, 547 U.S. 813 (2006)) in the United States Supreme Court, and in January will argue *Briscoe v. Virginia*, No. 07-11191. I will comment here only on matters related to the confrontation right, ad not on those related to the right to a public trial.

1. Section 2163a is the product of a bygone era, in which the right to confrontation was considered subject to balancing away against significant governmental interests. That era ended with *Crawford v. Washington*, 541 U.S. 36 (2004), which spoke of the right in hard-edged, categorical terms. The continued survival of *Maryland v. Craig*, on which a defense of § 2163a would have to rely, is very dubious in light of *Crawford*. *Craig*, a 5-4 decision, is very much based on the old constitutional regime; Justice Scalia, who wrote *Crawford*, dissented bitterly in *Craig*, and the whole approach of *Craig* is radically different from that of *Crawford*. The *Pesquara* decision from our Court of Appeals is pre-*Crawford*. Hence, it gives no guidance as to the constitutionality of § 2163a, and it would be disingenuous to put any substantial weight on it. In light of these facts, I do not believe it is appropriate to extend § 2163a, especially to a setting – certain adult witnesses – not covered by *Craig*.

2. I do not see how the physical condition of a witness (in § 15) provides a basis for the remedies in § 16. (The same is true of §§ 13 and 14, but they apply to preliminary examinations, and so the Confrontation Clause is not invoked.) These sections provide, on a vague finding of necessity, that the witness should be protected from viewing the defendant – just what the Confrontation Clause requires – and that the defendant and *all* witnesses be as far away as reasonably possible. In a post-*Crawford* world, these two sections appear as an assault on the confrontation right. Even assuming these measures remain constitutionally permissible in the case of a child witness, and even assuming that an extension to a mentally disabled witness would be permissible, I believe it is blatantly unconstitutional to extend the provision on the basis of physical disability. (I assume there has not been a widespread practice of defendants assaulting witnesses while they testify in Michigan courtrooms; if there were, at least I could see how the provision would address the concern, though surely other remedies – more bailiffs? – would be preferred constitutionally.)

3. I appreciate the desire to minimize, to the extent practical, the ordeal that vulnerable adults face in testifying. But it does nobody any good to do so in an unconstitutional manner, which would likely require reversal of convictions and retrial, with the witness having to testify again, in the constitutionally prescribed way.

I hope these comments are useful, and am glad to consult further if that might be helpful to the Committee or to any members of the Legislature.

Sincerely,

Richard D. Friedman